NORDIN BIN SALLEH

v.

KERAJAAN NEGERI KELANTAN & ANOR.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' GUNN CHIT TUAN CJ (MALAYA)
[CIVIL APPLICATION NO. 08-10-1993]
3 SEPTEMBER 1993

CONSTITUTIONAL LAW: Applicant lodged police reports against mosque official - Applicant charged with insulting mosque official - Kelantan Council of Religion and Malay Customs Enactment 1966, s. 73 - Whether Kelantan State legislature had power to enact provision - Application for declaration that Enactment invalid-Federal Constitution,Article 4(3) & (4) - Whether leave of Court necessary to commence proceedings - Whether applicant had shown an arguable case.

The applicant was served with two separate summons sent by the Chief Kadi of Kelantan charging him, pursuant to s. 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 (the Enactment), with insulting a mosque official because he had lodged two separate police reports against a mosque official.

The applicant sought leave, pursuant to Article 4(4) of the Federal Constitution, to file proceedings for declarations that s. 73 of the Enactment is invalid on the grounds that it makes provision with respect to a matter with respect to which the Legislature of the State of Kelantan had no power to make.

The applicant further contended that s. 73 of the Enactment is void pursuant to Article 4(1) of the Federal Constitution on the grounds that the said section is inconsistent with Article 10(1) of the Federal Constitution.

Held:

[1] The applicant had shown an arguable case in that the application was not frivolous. The Enactment is a post-Merdeka legislation and the intended challenge is on the competency of the Kelantan State Legislature to enact the legislation. The two prayers in the notice of motion are not merely grounded on the impugned law being inconsistent with the Constitution but challenges the validity of the legislation on the grounds that it deals with a matter with respect to which the State Legislature has no power to make law.

[2] As such leave of a Judge of the Supreme Court is required under Article 4(4) of the Federal Constitution and the applicant should be allowed to canvass his case before the full Court on the constitutionality and validity of s. 73 of the Enactment.

[3] The High Court has jurisdiction to deal with the application for a declaration that s. 73 of the Enactment is void on the grounds that it is inconsistent with the provisions of Article 10(l)(a) of the Federal Constitution and the leave of a Judge of the Supreme Court was not required.

[Applicant granted leave to file proceedings in the Supreme Court for declarations in terms of prayers (a) and (b) of the notice of motion].

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG PERLEMBAGAAN: Pemohon membuat laporan polls terhadap pegawai masjid - Pemohon dituduh menghina pegawai masjid - Enakmen Majlis Agama dan Adat Istiadat Melayu Kelantan 1966, s. 73 - Sama ada perundangan Negeri Kelantan mempunyai kuasa untuk menggubal peruntukan- Permohonan untuk perisytiharan bahawa Enakmen adalah tidak sah - Perlembagaan Persekutuan Perkara 4(3) & (4) - Sama ada kebenaran Mahkamah perlu untuk memulakan prosiding - Sama ada pemohon telah menunjukkan suatu kes yang boleh dibicarakan.

Permohon telah disampaikan dengan dua saman berasingan oleh Kadi Besar Kelantan yang menuduh pemohon, menurut s. 73 Enakmen Majlis Agama dan Adat Istiadat Melayu Kelantan 1966 (Enakmen tersebut), menghina seorang pegawai masjid kerana pemohon telah membuat dua laporan berasingan terhadap seorang pegawai masjid.

Pemohon memohon kebenaran, menurut Perkara 4(4) Perlembagaan Persekutuan, bagi memfailkan prosiding untuk perisytiharan bahawa s. 73 Enakmen tersebut adalah tidak sah atas alasan bahawa ia membuat peruntukan berhubung dengan suatu perkara di mana Perundangan Negeri Kelantan tidak mempunyai kuasa untuk menggubalnya.

Selanjutnya Pemohon menghujahkan bahawa s. 73 Enakmen tersebut adalah tidak sah menurut Perkara 4(1), Perlembagaan Persekutuan atas alasan bahawa seksyen tersebut adalah bertentangan dengan Perkara 10(1), Perlembagaan Persekutuan.

Diputuskan:

[1] Pemohon telah menunjukkan suatu kes yang boleh dibicarakan di mana permohonan berkenaan bukanlah sesuatu yang remeh. Enakmen tersebut merupakan perundangan yang dibuat selepas mencapai kemerdekaan dan bakal tentangan tersebut ialah ke atas kelayakan Perundangan Negeri Kelantan untuk menggubal perundangan tersebut. Kedua-dua pohonan dalam notis usul bukanlah semata-mata kerana alasan bahawa undang-undangyang dipersoalkan itu sebagai bertentangan dengan Perlembagaan tetapi ia menentang keesahan perundangan atas alasan bahawa ianya berurusan dengan suatu perkara yang berhubung dengan mana Perundangan Negeri tidak mempunyai kuasa untuk menggubalnya.

[2] Oleh yang demikian kebenaran seorang Hakim Mahkamah Agung diperlukan di bawah Perkara 4(4), Perlembagaan Persekutuan dan pemohon harus dibenarkan untuk mengemukakan kesnya di hadapan Mahkamah penuh mengenai perlembagaan dan keesahan s.73 Enakmen tersebut.

[3] Mahkamah Tinggi mempunyai kuasa untuk berurusan dengan permohonan untuk perisytiharan bahawa s. 73 Enakmen tersebut adalah tidak sah atas alasan bahawa ia adalah bertentangan dengan peruntukan Perkara 10(l)(a), Perlembagaan Persekutuan dan kebeneran seorang Hakim Mahkamah Agung tidaklah diperlukan.

[Pemohon diberikan kebenaran untuk memfailkan prosiding dalam Mahkamah Agung untuk perisytiharan mengikut pohonan (a) dan (b) dalam notis usul].

Cases referred to:

*Mamat bin Daud & Ors. v. Government of Malaysia [1986] 2 CLJ 118 1 [1986] 2 MLJ 192 (**refd**)*

*Ah Thian v. Government of Malaysia [1976] MLJ 112 (**refd**)*

*Syarikat Banita Sdn. Bhd. v. Government of State of Sabah [1977] 2 MLJ 217 (**refd**)*

*Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor. [1991] 3 CLJ 2768 1 [1992] 1 MLJ 1@9 (**refd**)*

*Ramasamy all Shanmugam v. State Government of Penang & Government of Malaysia [1986] 2 CLJ 121 1 [1986] 2 MLJ 188 (**refd**)*

Legislation referred to:
Council of Religion and Malay Custom and Kadzis Courts Enanctment 1953
Employees' Social Security Act 1969
Federal Constitution, Articles 4(l), (3), (4), 8(l), 10(l)(a), 74(4), 77,128 (l)(a)
Firearms (Increased Penalties) (Amendment) Act 1974
Hindu Endowments Ordinance 1906
Kelantan Council of Religion and Malay Custom Enactment 1966, ss. 59(2), 73, 87
Muslim Courts (Criminal Jurisdiction) Act 1965
Penal Code, s. 298A
Sabah Forest Enactment 1968, s. 24(7)
Syariah Courts (Criminal Jurisdiction) Act 1965, s. 2

For the applicant - Zaki bin Tun Azmi (Wan Ismail & Alex De Selva with him); Mis. Rashid & Lee
For the 1st respondent - Ahmad bin Hj. Maarop, State Legal Advisor, Kelantan
For the 2nd respondent - Zainur Zakaria (Yusof bin Hj. Mohd. Nor & Sukri bin Hj. Mohamed with him); M/s. Zainur Zakaria & Co.

JUDGMENT

Gunn Chit Tuan CJ (Malaya):

This was an application by notice of motion for leave to commence proceedings pursuant to Article 4(4) of the Federal Constitution. Articles 4(3) and 4(4) of the Federal Constitution provide as follows:

> Article 4(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or -
>
> (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
> (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.
>
> Article 4(4) The proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a Judge of the Supreme Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

The applicant, Nordin bin Salleh, sought leave to file proceedings for declarations that s. 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 is invalid on the following grounds set out in his notice of motion dated 9 April 1993:

(a) A declaration that s. 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 is invalid on the grounds that it makes provision with respect to a matter with respect to which the Legislature of the State of Kelantan had no power to make on the following grounds:
  (1) it creates an offence which is not an offence against the precepts of Islam;
  (2) it is not a matter relating to the precepts of Islam;
  (3) it is a matter with respect to which the Parliament has exclusive power to legislate in respect of, as set out in Clause 4 of the Ninth Schedule (List 1- Federal List) and which the State of Kelantan has no power.

(b) Alternatively, a declaration that's. 73 is invalid to the extent that it includes "pegawai masjid" on the following grounds:
  (1) contempt of the lawful authority of the pegawai masjid does not constitute an offence against the precepts of Islam;
  (2) it is not a matter relating to the precepts of Islam;
  (3) it is a matter with respect to which the Parliament has exclusive power to legislate in respect of, as set out in Clause 4 of the Ninth Schedule (List 1 - Federal List) and which the State of Kelantan has no power;

(c) A declaration that s. 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 is void pursuant to Article 4(1) of the Federal Constitution on the grounds that it is inconsistent with Article 10(1) (a) of the Federal Constitution.

Section 73 of the said Enactment is as follows:

> Whoever, shall be guilty of any contempt of the lawful authority of His Highness the Sultan in his capacity as the Head of the religion of the State, or of the Majlis or any Committee or member or officer thereof, or of any Court, or the presiding officer thereof, or of pegawai masjid, shall be punishable with imprisonment for a term not exceeding three months or with fine not exceeding RM500.
>
> Provided that a person not professing the Islamic religion who commits an offence under this section shall be tried in the Magistrates Court.

The facts which gave rise to the application are a set out in the affidavit of Nordin bin Salleh affirmed on 7 April 1993. Briefly the salient facts were that on 23 March 1993 the applicant was served with two separate summons sent by the Chief Kadi of Kelantan charging him pursuant to s. 73 of the Kelantan Council of Religion and Malay Custom Enactment with insulting a mosque official because he had lodged two separate police reports against the mosque official. The first ground, as set out above, upon which the plaintiff relied on to seek a declaration that s. 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 is invalid is because it makes provision with respect to a matter which the legislature of the State of Kelantan had no power to make. Dato' Zaki bin Tun Azmi, the leading Counsel for the applicant, stated that the validity of the said s. 73 was to be challenged on the ground that it deals with a matter with respect to which the legislature of the State of Kelantan has no power to make that law. As such the leave of a Judge of the Supreme Court is required as provided for under Article 4(4) of the Federal Constitution. Counsel stated that the applicant was merely required to show that he had an arguable case which was not frivolous. He referred to *Mamat bin Daud & Ors. v. Government of Malaysia* [1986] 2 MLJ 192 in which case Mohd. Azmi SCJ had pointed out that in order to succeed an applicant must satisfy the Court firstly that leave is necessary under Article 4(4) and secondly, that they have an arguable case in that the application is not frivolous. In this case the applicant is challenging the said s. 73 on the grounds that it deals with a matter in respect of which the legislature of the State of Kelantan has no power to make law and as the application is not frivolous the applicant should be allowed to canvass his case before the full Court on the constitutionality and validity of that section.

Counsel then referred to item 1 of the State List in the 9th Schedule of the Federal Constitution which is as follows:

> 1. Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, bethrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State: Malay customs; Zakat, Pitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law See Muslim Courts (Criminal Jurisdiction) Act 1965 (No. 23 of 1965), the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine Malay custom.

He submitted that the offence created by the said s. 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 was not against the precepts of Islam nor is it a matter relating to the precepts of Islam and contended that it is a matter in respect of which Parliament has exclusive power to legislate as set out in Item 4 of the Federal List in the 9th Schedule of the Federal Constitution. Counsel pointed out that the application was supported by an affidavit affirmed on 8 April 1993 by one Razali bin Nawawi who is currently an Associate Professor and Lecturer of Syariah Law at the Faculty of Law, International Islamic University, Malaysia. He also pointed out that at para 5 of Razali bin Nawawi's said affidavit he has stated as follows:

> In accordance with my knowledge and opinion of the Precepts of "Hukum Syarak" there is no such concept or meaning of "contempt" ("menghina" or "mengeji") as contained in s. 73 of the Kelantan Council of Islamic Religion and Malay Custom Enactment 1966.

and at para 6 he has also stated as follows:

> The Precepts of the Islamic Religion as stated in the "Hadith Rasulallah" are: "mengucap dua kalimah shahadah"; praying at five designated times (sembahyang lima waktu); Fasting during the month of Ramadhan (Puasa Bulan Ramadhan);

> Payment of Alms (Berzakat); Pilgrimage (menunaikan Fardhu Haji). The Precepts of Iman (Rukun-Rukun Iman) are: believing in Allah and His Prophet (Allah dan Rasulnya); Angels (Malaikat); the Holy Books (Kitabullah); Quadar dan Qadha"; Judgment Day (Hari Qiamat). Therefore, the act of "contempt" ("mengeji, menghina atau mencerca") towards any person whomsoever (except Allah and Rasulallah SAW) is not within the Precepts of the Islamic Religion and the "Rukun-rukun Iman" as the Precepts of the Islamic Religion and the "Rukun-rukun Iman" are clear.

Dato' Zaki therefore submitted that the legislature of the State of Kelantan, in enacting the said s. 73, has enacted a law in relation to a matter which does not constitute an offence against the precepts of Islam or Islamic law.

The alternative ground upon which the applicant relied on was that s. 73 of the Kelantan Council of Religion and Malay Custom Enactment is inconsistent with Article 10(l)(a) of the Federal Constitution which provides that every citizen has the right to freedom of speech and expression. He pointed out that restrictions on a citizen's fundamental right to free speech are set out in Clauses (2), (3) and (4) of Article 10 and that only Parliament, not the State legislature, may by law impose such restrictions. It was the submission of the applicant that the lodging of a police report is the exercise by a citizen of his or her right to free speech. It was therefore submitted that if s. 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 enables the Kelantan Council to charge a citizen with contempt for filing a police report against a mosque official, then the direct effect of that section is to impinge upon a citizen's right of free speech.

Counsel then referred again to Item I of the State List and pointed out that it is provided that "except in regard to matters included in the Federal List, the constitution, organization and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the, matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by Federal law". He therefore contended that before the Syariah Courts have jurisdiction to try an offence, jurisdiction in respect of that offence must have been conferred on the Syariah Courts by Federal law. Counsel then referred to the following s. 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965 and stated that that section only confers criminal jurisdiction on the Syariah Courts in relation to offences against the precepts of the religion of Islam:

> Section 2. The Syariah Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law:
>
> Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof.

Counsel then contended that the Syariah Courts only have jurisdiction to try offences against the precepts of Islam and submitted that the offence of contempt against the pegawai masjid as provided for in s. 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 does not constitute an offence against the religion of Islam and accordingly the legislature of the State of Kelantan did not have the power, to enact the following s. 59(2)of theKelatan Council of Religion and Malay Custom Enactment which purports to give jurisdiction on a Syariah Court in relation to an offence which has not been conferred by Federal law:

> Section 59(2). Save as otherwise in this Enactment expressly provided, no prosecution for any offence against this Enactment shall be had in any Court other than the Court of the Kadzi Besar or a Court of a Kadzi.

It was therefore the submission of counsel that the said s. 59(2) of the Kelantan Council of Religion and Malay Custom Enactment must be invalid to the extent that it purports to grant the Courts of the Kadi Besar or Kadi jurisdiction to deal with an offence pursuant to s. 73 of the said Enactment on the grounds that the State legislature of Kelantan had no power to enact such a law.

Encik Zainur Zakaria, Counsel for the second respondent, after referring to the above-quoted prayer (c) in the notice of motion, then referred to *Ah Thian v. Government of Malaysia* [1976]

MLJ 1 12 in which case Suffian LP (as he then was) had held that as the argument of the applicant in that case was that the Firearms (Increased Penalties) (Amendment) Act 1974 was ultra vires the Federal Constitution as it contravened Article 8(1) of the Constitution and was therefore void, Clause (4) of Article 4 of the Constitution did not apply and the point may be raised in the ordinary way in the course of submission and determined in the High Court without reference to the then Federal Court and there was no need for leave of a Judge of the Federal Court. Counsel submitted that similarly in this case no leave of a Judge of the Supreme Court was required for prayer (c) of the said notice of motion.

He then referred to *Syarikat Banita Sdn. Bhd. v. Government of State of Sabah* [1977] 2 MLJ 217 in which case Suffian LP (as he then was) again held that as the validity of the new subsection (7) of s. 24 of the Sabah Forest Enactment 1968 is to be challenged on the ground that it is contrary to the provisions of the Federal Constitution and not on the grounds that it deals with a matter with respect to which the Sabah legislature has no power to make law, the High Court has jurisdiction in the matter and the leave of a Judge of the then Federal Court was not required. Counsel also referred to *Rethana v. Government of Malaysia* [1984] 2 MLJ 52 in which case Mohd. Azmi FJ (as he then was) held that the Employees' Social Security Act 1969, was challenged in that case not on the basis that Parliament has no power to enact it but on the grounds that some of its provisions are inconsistent with certain provisions of the Constitution. The intended suit was within the jurisdiction of the High Court and therefore the provisions of Article 4(4) of the Federal Constitution regarding leave to commence proceedings in the then Federal Court did not arise. Encik Zainur therefore concluded that the leave of a Judge of the Supreme Court was not necessary under Article 4(4) of the Federal Constitution regarding that prayer.

Next, it was contended by Encik Zainur that it was not for the Supreme Court to decide what is meant by the expression "precepts of Islam". He referred to *Dalip Kaur v. Pegawai Palis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor.* [1992] 1 MLJ 1 @ p. 9 in which case Mohd. Yusoff SCJ (as he then was) had stated that the foremost question to be determined is whether the deceased in that case had renounced Islam during his lifetime and the only forum qualified to answer that question is the Syariah Court. He contended that the application in this case for leave to commence proceedings pursuant to Article 4(4) of the Federal Constitution was frivolous and should be determined by the Syariah Court.

Encik Yusof bin Hj. Mohd. Nor, another Counsel for the second respondent referred to Clause 9 of the State List in the Ninth Schedule of the Federal Constitution which is as follows:

> Creation of offences in respect of any of the matters included in the State List or dealt with by State law, proof of State law and of things done thereunder, and proof of any matter for purposes of State law.

He then referred to Article 74(4) of the Constitution which is as follows:

> Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

He therefore contended that the said s. 59 of the Kelantan Council of Religion and Malay Custom Enactment could be enacted by virtue of the above-quoted Item 1 of the State List in the Ninth Schedule of the Federal Constitution.

Encik Ahmad bin Hj. Maarop, the State Legal Advisor, Kelantan appearing for the first respondent having adopted the submissions of the other Counsel for the second respondent, referred to Ramasamy all *Shanmugam v. State Government of Penang & Government of Malaysia* [1986] 2 MLJ 188 in which case the applicant had applied for a declaration that the Hindu Endowments Ordinance 1906 (Straits Settlements Cap. 175) is invalid and void. He applied for leave under Article 4(4) of the Federal Constitution and Mohd. Azmi SCJ (as he then was) held that a declaration under Article 4(4) read with Article 128(l)(a) applies only to post-Merdeka law whether Federal or State. Since the Hindu Endowments Ordinance 1906 (Straits Settlements Cap. 175) is a pre-Merdeka law, the application should not have been brought to the Supreme Court as a Court of first instance. Counsel then referred to s. 87 of the Kelantan Council of Religion and Malay Custom Enactment 1966, which repealed the Council of Religion and Malay Custom and Kadzis

Courts Enactment l953. He there for econtended that the Kelantan Council of Religion and Malay Custom Enactment 1966 is a pre-Merdeka law and that therefore the present application should not have been brought to the Supreme Court in the first instance. He then referred to *Mamat bin Daud & Ors. v. Government of Malaysia* [1988] 1 MLJ 119 in which case the Supreme Court by a majority of 3 to 2 held that the provisions of s. 298A of the Penal Code is a colourable legislation in that it pretends to be a legislation on public order, when in pith and substance it is a law on the subject of religion with respect to which only the states have power to legislate under Articles 74 and 77 of the Federal Constitution. He therefore contended that as s. 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 was concerned with contempts of religion, it should therefore be within the power of the State legislature to enact it.

As para (c) of the notice of motion was to seek a declaration that s. 73 of the Council of Religion and Malay Custom Enactment 1966 is void on the grounds that it is inconsistent with the provisions of Article 10(1)(a) of the Federal Constitution and not on the grounds that it deals with a matter with respect to which the Kelantan legislature has no power to make it, the High Court has jurisdiction in the matter and the leave of a Judge of the Supreme Court was not required. As for the prayers in para (a) and (b) of the notice of motion, I was satisfied that the applicant has an arguable case in that the application is not frivolous. I am of the view that the Kelantan Council of Religion and Malay Custom Enactment 1966 is a post-Merdeka legislation and the intended challenge is on the competency of the Kelantan State Legislature to enact the legislation. The two prayers are not merely grounded on the impugned law being inconsistent with the Constitution and the validity of the legislation is to be challenged on the grounds it deals with a matter with respect to which the State legislature has no power to make law. As such leave of a Judge of the Supreme Court is required under Article 4(4) and the applicant should be allowed to canvass his case before the full Court on the constitutionality and validity of that section in the said Enactment. I therefore made an order granting leave to the applicant to file proceedings in the Supreme Court for declarations in terms of prayers (a) and (b) of the said notice of motion.

PUBLIC PROSECUTOR

v.

LAWRENCE TAN HUI SENG

SUPREME COURT, KUALA LUMPUR
TUN DATO' SERI ABDUL HAMID
BIN OMAR LP,
TAN SRI DATUK GUNN CHIT
TUAN CJ (MALAYA),
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[CRIMINAL REFERENCE NO: 06-8-90]
4 AUGUST 1993

CRIMINAL LAW: Charge under s. 409 Penal Code - Criminal breach of trust - Appeal against discharge and acquittal - Whether appellate Court entitled to interfere - Whether questions of law of public interest had arisen in the course of the appeal - Appellate Courts determination of the questions of law.

The respondent was prosecuted on two counts of criminal breach of trust in contravention of s. 409 of the Penal Code. The respondent was acquitted and discharged by the trial Court and on appeal, the High Court upheld the acquittal on substantially the same grounds as that advanced by the trial Court.

The appellant successfully applied to the Supreme Court for leave to refer certain questions, said to be questions of law of public interest, for determination, whichhad arisen in the course of the appeal and the determination of which by the High Court, had affected the event of the appeal.

At the hearing of the appeal, the Supreme Court treated the reference as a re-hearing of the appeal and reviewed the entire evidence.

Held:

[1] The conclusions of both the Courts below revolved around issues of fact depending on the credibility of the respondent, as to which there were concurrent findings of fact in his favour. In the event the Court was not persuaded that both those Courts were not entitled to arrive at the conclusion that the respondent had succeeded in raising a reasonable doubt as to the truth of the case for the prosecution or as to his guilt, in respect of both the charges.

[2] Therefore the questions posed by this reference were not questions of law within the meaning of s. 66(1) of the Courts of Judicature Act 1964 (the Act) in that they were not questions of